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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GERALD W. McCOMBER Defendant.	Case No. SA CR 13-00166 DDP **ORDER DENYING MOTION TO DISMISS** [DKT No. 15]

Presently before the court is Defendant Garald W. McComber's Rule 12(b)(3) motion to dismiss a single count indictment charging him with forgery of a judge's signature, in violation of 18 U.S.C. § 505. The motion is suitable for adjudication without oral argument. Having considered the parties' submissions, the court now adopts the following order.

I. Background

The parties agree upon the following:

In approximately February 2013, Gerald McComber applied for a position as an insurance agent with One America Services ("One

America"). McComber met and interviewed with Mark Anderson of One America and was offered a position, pending McComber's passing of a background check.

As part of the company's background check, One America obtained a credit report, which disclosed a tax lien against McComber. At the direction of the company's compliance office, Anderson questioned McComber about the lien. McComber informed Anderson that the tax lien had been taken care of and that evidence of the resolution would be forthcoming.

Subsequently, Anderson received a letter via fax dated October 3, 2012, addressed to Gerald W. McComber, and ostensibly signed by "Alice Marie Stotler, [sic] U.S. District Judge." The letter states that "Tax Lien #0508725R has been released from your name, and the amounts in question have been satisfied completely." (Mot. Ex. C.) It further states that "[t]here are no outstanding fees or penalties due, and your record has been cleared of any restrictions or liens." (Id.)

Apparently suspicious of the letter's authenticity, a One America official contacted the district court to determine its origins. It appears Judge Stotler then referred the matter to the FBI, which initiated an investigation, leading to the instant prosecution. On December 4, 2013, a Grand Jury returned a one-count indictment against McComber for forgery of a judge's signature, in violation of 18 U.S.C. § 505. (DKT No. 1.) The indictment states as follows:

> On or about March 3, 2013, in Orange County, within the Central District of California, and elsewhere, defendant GERALD W. McCOMBER knowingly forged the signature of a judge

> of the United States, and knowingly concurred in the use of such forced signature, namely, the signature of United States District Judge Alicemarie H. Stotler, on a document, for the purpose of authenticating a document, namely a document purporting to release defendant McCOMBER from Federal Tax Lien #0508725R.

(Id.)

On December 6, 2013, McComber filed the instant motion to dismiss the indictment, asserting that the indictment is invalid because it does not explicitly state that McComber acted with intent to defraud and therefore fails to state an essential element of the offense. (See Mot. at 5.)

II. Legal Standard

Pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B), a defendant may bring a motion challenging the sufficiency of the indictment. Fed. R. Crim. P. 12(b)(3)(B).

An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1). An indictment is sufficiently pled if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend...." United States v. Lazarenko, 546 F.3d 593, 599 (9th Cir. 2008). An indictment's failure to "recite an essential element of the charged offense is not a minor or technical flaw ... but a fatal flaw requiring dismissal of the indictment. United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999).

III. Discussion

To resolve the instant motion, the court must determine whether the 18 U.S.C. § 505 entails an intent to defraud and thus whether the government's indictment of McComber under § 505 must, to be valid, state that McComber acted with an intent to defraud. The court concludes that there is no such requirement.

Title 18 U.S.C. § 505 states:

> Whoever forges the signature of any judge, register, or other officer of any court of the United States, or of any Territory thereof, or forges or counterfeits the seal of any such court, or knowingly concurs in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document, or tenders in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, shall be fined under this title or imprisoned not more than five years, or both.

Id.

McComber acknowledges that § 505 does not state that a defendant must act with intent to defraud. (Mot. at 5.) He also acknowledges that the Ninth Circuit has not issued any opinion reading this element into the statute. (Id.) He nevertheless contends that this court should dismiss the indictment because it does not state that McComber acted with an intent to defraud. The court is unpersuaded.

A review of decisions from other circuits finds that the weight of reasoned authority is against reading an intent-to-defraud requirement into the statute. As McComber acknowledges, both the Tenth and the Second Circuits have held that intend to defraud is not an element of § 505. See United States v. Reich, 479 F.3d 179, 187-89 (2nd Cir. 2007); United States v. Cowan, 116 F.3d 1360 (10th Cir. 1997). The court finds the rationale of these cases convincing.

In Reich, in a decision authored by then Judge Sotomayor, the Second Circuit considered whether a jury should have been instructed to find an intent to defraud under 18 U.S.C. § 505 where the defendant had allegedly forged the signature of a United States magistrate on a document purporting to be a judicial order. Reich, 479 F.3d at 187. There, the defendant argued, as McComber does here, that the court should construe the term "forgery" in light of its common-law meaning, which required an intent to defraud. See id. at 187-188; Mot. at 6. However, the court rejected this argument in light of the cannon that courts should not assign a common-law meaning to a statutory term "when that meaning is ... inconsistent with the statute's purpose." Id. at 188, citing Taylor v. United States, 495 U.S. 575, 594-95 (1990). The Court explained that, historically the term "to defraud" referred to use of a dishonest scheme or method to deprive another of something of value. Id., citing McNally v. United States, 483 U.S. 350, 358 (1987). However, in the case of § 505, it found that the clear intent of Congress was not protecting private parties from financial loss, but rather "protecting the integrity of a government function—namely, federal judicial proceedings." Id. The

Court concluded: "When an individual forges a judge's signature in order to pass off a false document as an authentic one issued by the courts of the United States, such conduct implicates the interests protected by § 505 whether or not the actor intends to deprive another of money or property." Id.

In support of this conclusion, the Court surveyed the counterfeiting and forgery provisions of Title 18, Chapter 25, in which § 505 appears. Id. at 188-89. The Court noted that, of the provisions in Chapter 25 designating criminal acts involving or akin to forgery, nearly all of which were passed together with § 505 in 1948, some very clearly require an intent to defraud while others do not. Id. This variation, the Court concluded, suggested that Congress deliberately chose to require an intent to defraud for some forgery and counterfeiting crimes, but not for others. Id. at 188. Moreover, the Court observed that provisions requiring an intent to defraud tended to "criminalize forgeries and counterfeits likely to be used to defraud private citizens out of their money or property," while those lacking an intent to defraud tended to "criminalize[] activities likely to impugn the reputation or integrity of the federal government regardless of whether the perpetrator intended to defraud private citizens." Id. at 189. The Court found that this pattern further supported the conclusion that Congress did not intend to include an intent-to-defraud element in § 505.

Similarly, in Cohen, the Tenth Circuit considered "whether the intent to defraud is an element of the crime of forging the signature of a federal judge in violation of 18 U.S.C. § 505. Section 505." Cohen, 116 F.3d at 1361. It held that "intent to

defraud is not an element of the crime." Id. The Court began by noting that "nowhere does 8 U.S.C. § 505 say the crime of forging a federal judge's signature requires an intent to defraud. Nothing in the text of the statute even suggests that Congress intended to include the intent to defraud as an element of the crime." Id. at 1361-62. As in Reich, the court then considered the defendant's argument that the term "to defraud" should be construed in light of its established common-law meaning. Id. at 1362. Like Reich, it concluded, however, that reading an intent to defraud into § 505 would be at odds with the purpose of the statute, explaining:

> The purpose of § 505 is to protect the reputation and integrity of the federal courts, their official documents and proceedings, rather than simply to outlaw a narrow category of fraud. The statute applies whenever someone attempts to impugn this integrity by forging a federal judge's signature onto a document in order to make that document appear authentic. A forged signature on a document which the forger intends to appear authentic is the only intent requirement of § 505.3 Our construction of § 505 is true to both its text and purpose.

Id. at 1363. Finally, as in Reich, the court concluded, given that Congress included an "intent to defraud" in other statutes criminalizing forgeries and counterfeiting, "that if Congress had intended to make the intent to defraud an element of the crime of forging a federal judge's signature under 18 U.S.C. § 505, it would have done so expressly." Id.

In support of its contention that this court should read an intent to defraud into the statute, McComber cites Levinson v. United States, 47 F.2d 470, 471 (6th Cir. 1931); United States v.

Bertrand, 596 F. 2d 150 (6th Cir. 1978); United States v. London, 714 F.2d 1558 (11th Cir. 1983); and United States v. Dyer, 456 F.2d 1313 (7th Cir. 1976). However, these cases offer only minimal support for McComber's position.

Levinson, decided in 1931, pre-dated Congress's enacting of § 505 in 1948. It also pre-dated Congress' enactment, the same year, of numerous other provisions of Chapter 25, an analysis of which were a key basis for the Second and Tenth Circuit's conclusions, respectively, in Reich and Cohen, on this matter, as discussed above. The Levinson court thus did not have before it critical evidence underlying those decisions. Moreover, the court finds Levinson's rationale unconvincing. The Levinson court noted that "[t]he word 'forged' in the statute under which this conviction was had must be given some meaning" and concluded that this meaning must, necessarily, be found in the common-law definition of the crime of forgery. Levinson, 47 F.2d at 471 ("We are of the opinion that Congress, regardless of its intent, by the use of the verb 'forge,' limited the application of the statute, in so far as cases of intended authentication are concerned, to those in which the elements of common-law forgery enter.") This court finds more convincing the Second and Tenth Circuit's rationale that use of the term "forge" in the case of § 505 should not trigger a common-law meaning because the common-law meaning is at odds with the apparent purpose of the statute. See Reich, 479 F.3d at 188 (2nd Cir. 2007); United States v. Cowan, 116 F.3d 1362.

The additional authorities cited by McComber--Berltrand, London, Dyer--do not help him. First, the Berltrand court read an intent to defraud into the statute only because it felt compelled

to do so under principles of *stare decisis* in light of Levinson. See Berltrand, 596 F. 2d at 152. Apart from quoting Levinson, a case whose rationale the court finds unconvincing, Berltrand provides no analysis on the matter at issue. Id.

Second, the Eleventh Circuit held in London that the common-law definition of forgery should be used to construe "to forge" in § 505, but as the government points out, the question of whether an intent to defraud should be read into the statute was not before the Court, which was considering whether the passing off of a photocopy of a judge's signature as the original should be considered fraud. London, 714 F.2d at 1563. Reliance on the common-law meaning in London is premised on the notion that the purpose of § 505 cannot be readily divined. Id. This court disagrees, finding that the tools of statutory interpretation used in Reich and Cohen yield a sufficient understanding of the statute's purpose to decide the instant matter. Moreover, the decision in London rested heavily on the U.S. Supreme Court's decision in Benson v. McMahon, 127 U.S. 457 (1888), where, in the context of a case not involving § 505, the Court drew upon the common-law definition of forgery in deciding whether the printing of one's name on theater tickets without authorization constituted forgery. The heavy reliance on Benson minimizes the usefulness of London in resolving the matter here in light of the convincing distinction drawn by Judge Sotomayor in Reich between laws concerned with protecting private parties from financial loss (as in Benson) and those seeking to protect the integrity of a government function (as with § 505). See Reich, 479 F.3d at 188.

Third, Dyer provides only a passing reference to the matter at hand. The case notes only that "much could be said" of the view that proof of the offense designated by § 505 requires evidence of the signer's intent to defraud. See Dyer, 546 F.2d at 1316. Apart from being dicta, Dyer offers little support to McComber because the court provided no explanation of what arguments in support of this view it found convincing.

In sum, having considered the parties' submissions and the opinions of other circuits, this court finds the reasoning of the Second and Tenth Circuits most convincing and adopts their rationale, as set forth in Reich and Cohen, on this matter. Accordingly, the court will not read into § 505 the element of an intent to defraud.

Because McComber's motion to dismiss is premised on § 505 including such a requirement, the court denies the motion to dismiss.

IV. Conclusion

For the reasons set forth herein, the court DENIES Defendant McComber's motion to dismiss the indictment in this case.

IT IS SO ORDERED.

Dated: January 9, 2014

DEAN D. PREGERSON
United States District Judge